446
15
LIBRARY
SUPREME COURT, U. S.

No. 446

Office-Supreme Court, U.S.
FILED
AUG 15 1966
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

OCTOBER TERM, 1966

---

CENTRAL OF GEORGIA RAILWAY COMPANY, ET AL.,
*Petitioners,*

v.

OSCAR L. ALTMAN, ET AL.,
*Respondents.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

GERHARD A. GESELL
701 Union Trust Building
Washington 5, D. C.
*Attorney for Petitioners*

JOHN B. MILLER
HITCH, MILLER, BECKMANN & SIMPSON
400 Georgia State Savings Bank Building
Savannah, Georgia

BINGHAM B. [illegible]VERICH
COVINGTON & BURLING
701 Union Trust Building
Washington 5, D. C.
*Of Counsel*

# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes and Regulations Involved | 2 |
| Statement | 3 |
| Reasons for Granting the Writ | 8 |
| Conclusion | 25 |
| Appendix A: Opinion and Judgment of the Court of Appeals | 1a |
| Appendix B: Order and Opinion of the District Court | 6a |


## CITATIONS

**Cases:**


*Doherty* v. *Mutual Warehouse Co.*, 245 F.2d 609 (5th Cir. 1957) ..... 23, 24
*Gross* v. *Owen*, 95 U.S. App. D.C. 222, 221 F.2d 94 (1955) ..... 18
*Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947) ..... 9, 10, 11, 12, 15, 16, 19
*Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463 (1941) ..... 21
*Hoffman* v. *Blaski*, 363 U.S. 335 (1960) ..... 17
*Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U.S. 180 (1952) ..... 10
*Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518 (1947) ..... 6, 9, 10, 11, 12, 13, 15, 16
*Kroese* v. *General Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1950), *cert. denied*, 339 U.S. 983 (1950) ..... 23, 24
*Langnes* v. *Green*, 282 U.S. 531 (1931) ..... 21
*Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902) ..... 21, 22, 24
*Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955) ..... 18
*Rogers* v. *Guaranty Trust Co.*, 288 U.S. 123 (1933) ..... 10
*Schuckman* v. *Rubenstein*, 164 F.2d 952 (6th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948) ..... 22, 23, 24
*Simons* v. *Simons*, 88 U.S. App. D.C. 180, 187 F.2d 364 (1951), *cert. denied*, 341 U.S. 951 (1951) ..... 18
*Sullivan* v. *Behimer*, 363 U.S. 335 (1960) ..... 9, 11
*Swan Land & Cattle Co.* v. *Frank*, 148 U.S. 603 (1893) ..... 21
*Tower Hill Connellsville Coke Co.* v. *Piedmont Coal Co.*, 33 F.2d 703 (4th Cir. 1929) ..... 22
*United States* v. *American Ry. Exp. Co.*, 265 U.S. 425 (1924) .. 21

Index Continued

**Statutes and Rules:** Page

Code of Georgia Annotated, Title 94 § 203 (2581) ..... 19
District of Columbia Code, Title 11 § 521 ..... 3
Judicial Code:
28 U.S.C. § 1254(1) ..... 2
28 U.S.C. § 1404(a) ..... 17, 18
Rules of the Supreme Court of the United States, R. 21(4) ... 3

**Miscellaneous:**

Annual Report of the Director of the Administrative Office of the United States Courts (1965) ..... 15

# Supreme Court of the United States

OCTOBER TERM, 1966

---

No.

---

CENTRAL OF GEORGIA RAILWAY COMPANY, ET AL.,
*Petitioners,*

v.

OSCAR L. ALTMAN, ET AL.,
*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Petitioners, Central of Georgia Railway Company and two of its directors, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in its case No. 19824.

### OPINIONS BELOW

The opinion of the Court of Appeals and the dissent, as yet unreported, appear at Appendix A, p. 1a, *infra*. The opinion of the United States District Court for the District of Columbia (Judge Spottswood W. Robinson, III) is reported at 254 F. Supp. 167 (1965) and appears at Appendix B, p. 6a, *infra*.

## JURISDICTION

The judgment of the Court of Appeals in its case No. 19824 was entered on May 19, 1966. Appendix A, p. 1a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

I

Whether the Court of Appeals may deny the inherent power of the United States District Court for the District of Columbia to resist imposition upon its jurisdiction of a stockholders' action to compel a Georgia corporation to pay past and future dividends where it appears that the District Court dismissed the action on the grounds of *forum non conveniens* after extensive consideration of all the factors relevant to the exercise of its discretion and no abuse of its discretion was found on appeal?

II

Whether the District Court for the District of Columbia has jurisdiction over a stockholders' action alleging that the directors of a Georgia corporation have abused their discretion and seeking a court order for payment of past and future dividends where it appears that not even a quorum of the directors whose affirmative action is required by law with respect to all dividend determinations can be served in the District of Columbia but that a majority of the directors are available in Georgia, where the corporation has its principal place of business?

## STATUTES AND REGULATIONS INVOLVED

None.

## STATEMENT

Two stockholders filed this class action in the United States District Court for the District of Columbia, naming as defendants Central of Georgia Railway Company (Central), a Georgia corporation operating a railroad in Georgia, Alabama and Tennessee, and eighteen of its directors. Jurisdiction of the District Court was based on Title 11, Section 521 of the District of Columbia Code.

The Complaint alleges that the directors of Central acted "arbitrarily, and in an abuse of their discretion" (JA 5)[1] in failing to declare and pay dividends on the company's preferred stock from 1960 through 1963 and seeks a court order directing Central's past and future dividend action. (JA 11). The Complaint, as framed against the named defendants, could not have been filed in any other federal court since complete diversity could not be shown and the cause of action is not itself based on any federal question.

Central and only two of its directors were found and served in the District of Columbia.[2] These defendants, petitioners here, moved the United States District Court for the District of Columbia to dismiss

---

[1] "JA" references are to the pages of the Joint Appendix printed for use in the Court of Appeals. Nine copies of the Joint Appendix have been filed with the Clerk of this Court pursuant to Rule 21(4) of the Supreme Court Rules.

[2] Separate but identical motions to dismiss were filed by Central and one of the directors, Mr. D. W. Brosnan. After the decision in the District Court, another directer, Mr. Franklin, was served. Mr. Franklin then filed an identical motion to dismiss and the parties have stipulated that his motion will be governed by the resolution of the two motions considered below. Mr. Franklin has since resigned as a director of Central, as of January 1, 1966.

the Complaint on jurisdictional and *forum non conveniens* grounds. The District Court accepted jurisdiction in spite of the absence of a quorum of the directors but dismissed on grounds of *forum non conveniens*. The Court of Appeals, without making any determination that the District Court had abused its discretion, took the view that the action should remain in the District of Columbia, affirming the District Judge on the jurisdictional point without comment.

The Motion to Dismiss was heard in the District Court on briefs and affidavits of the parties and was granted after extended oral argument lasting over two hours. Respondents conceded that the issue which would be presented at the trial as to the alleged abuse of discretion by Central's directors would relate "to what deliberations, if any, were taken by Central's Board of Directors in failing to declare preferred dividends and whether these decisions were arbitrary. Relief would essentially be the ordering of paying of dividends due, with protective measures to be sure that the decree was not flouted." (JA 101).

The proofs showed that Central was incorporated in 1895 under the Railroad Laws of Georgia and that its headquarters are located at Savannah, Georgia (JA 17, 21). Central operates railroad mainline mileage in Georgia, Alabama and Tennessee, of which 1,253 miles (71.8%) are located in Georgia (JA 18). Central does not operate and never has operated any railroad lines or facilities within the District of Columbia, has no trackage right over any other railroad in the District of Columbia and does not provide any freight or passenger service to or from the District of Columbia (JA 18).

Central has no bank account or other assets in the District of Columbia and pays no taxes there. (JA 18). It maintains an office in the District of Columbia for the solicitation of freight, principally from the Government, for movement over Central's system in Georgia, Alabama and Tennessee (JA 18). Central maintains its accounting records at Atlanta, where its computers are located (JA 19), and the minutes of the relevant meetings of its stockholders, Board of Directors, and Executive Committee are all maintained in Savannah (JA 18).

Central has eight employees in the District of Columbia, including several officers. The majority of its officers, including many officers specifically concerned with the issues in the case, and 1,502 employees are based in Georgia. (JA 18-19). The principal financial officer of Central and its President, both of whom are regularly consulted by the board on dividend matters, reside in Georgia, as do the principal officers of the company concerned with maintenance, operations, and similar factors affecting dividend policy (JA 19).

The proofs showed that the preferred stock of Central was held by 151 stockholders who reside in thirty different states and one foreign country (JA 19).[3] Nine of the shareholders, including both of the two respondents, show addresses in the District of Columbia (JA 19, 2).

---

[3] The proofs showed that Southern Railway Company owned approximately 93% of the preferred and 96% of the common stock of Central. Since the District Court rendered its decision, however, additional Central shares have been tendered to Southern, so that as of May 15, 1966, Southern owned 98.51% of Central preferred and 99.33% of Central common.

A Georgia railroad is required by statute to have a majority of its directors resident in that state (JA 20). Central has twenty directors, of whom fifteen reside in the State of Georgia (JA 20). Three of the directors are officers of Central, two are officers of Southern Railway Company, the principal shareholder, and the remaining members of the board are Central's General Counsel and various prominent independent businessmen (JA 24-26). Central's Board of Directors, which must pass on all dividend actions of the railway, usually meets in Georgia and has never met in the District of Columbia (JA 21). Under Central's By-laws, six directors constitute a quorum and accordingly the affirmative vote of a minimum of four directors is required for any action taken (JA 20).

Respondents acknowledged in the Complaint that during the years in question Central has incurred substantial expenditures for maintenance and massive repair and reconstruction of Central's lines, purchased in excess of $12,000,000 of boxcars, railway engines and other rolling stock, and undertaken projects for the repair and construction of yards and other facilities (JA 10, 11). The District Court recognized petitioners' contention that these expenditures and related anticipated and realized expenses obviously bearing on discretionary dividend actions would have to be reviewed at the trial in the course of an examination of Central's internal affairs through the testimony of directors, officers, and employees located in Georgia and also through records located in that state (App. B, p. 17a).[4]

---

[4] "App. B." references are to pages of the District Court's opinion printed in Appendix B of this brief.

On September 29, 1965, the District Court filed a detailed opinion containing findings of fact and a discussion of the pertinent authorities in which the Court set forth the grounds on which in its discretion it had determined to grant the motion to dismiss under the doctrine of *forum non conveniens*. Among the factors governing the District Court's exercise of its discretion were the following:

(1) that the traditional presumption in favor of the plaintiffs' choice of forum is, under this Court's decision in *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518, 524 (1947), "considerably weakened" in a stockholders' action such as the case at bar (App. B., p. 15a);

(2) that Central "is a Georgia corporation in the fullest sense of the word" and that "plaintiffs' action, by its very nature, will compel detailed inquiry into various aspects of Central's internal affairs" (App. B., pp. 15a, 17a);

(3) that the great majority of the witnesses whose testimony would necessarily have to be heard at trial reside in Georgia, beyond the reach of process from the District Court (App. B., p. 17a);

(4) that "the records and documents that trial of the issues would inevitably necessitate are concentrated overwhelmingly there [in Georgia]" (App. B., p. 18a);

(5) that Central's board meetings are traditionally held in Georgia, that its operations are centered there, and that "all important events in the litigation occurred outside of the District [of Columbia]" (App. B., pp. 16a, 18a);

(6) that the trial of this action will be governed by Georgia law (App. B., pp. 18a-19a);

(7) that "the exigencies of this Court's docket and its responsibilities to the Washington community necessitate that access be denied where local concern in the litigated matter is at best very remote." (App. B., p. 20a);

(8) that "objective evaluation of all factors related to the interests and conveniences of the parties and witnesses, the litigation itself and orderly administration of the law, leads inevitably to the conclusion that the action must be discontinued here." (App. B., p. 21a).

Respondents appealed, asserting that the District Court had abused its discretion and on May 19, 1966, the Court of Appeals reversed. In expressing the view that the action should remain in the District of Columbia, the Court of Appeals made no determination that the District Court had abused its discretion in any way, nor did it state that any of the findings of the District Court were erroneous.

Although petitioners also strenuously urged on brief and at oral argument that dismissal was required by reason of the fact that the District Court was without jurisdiction to entertain the action, the Court of Appeals made no reference to this aspect of the case.

On motion by petitioners, the Court of Appeals stayed the issuance of its mandate pending the outcome of this petition.

## REASONS FOR GRANTING THE WRIT

### I. Forum Non Conveniens

The District Court properly exercised its discretion and dismissed on grounds of *forum non conveniens.* Though no abuse of that discretion was found by the Court of Appeals, it nevertheless reversed. This ac-

tion by the Court of Appeals challenges not only the scope but the very existence of the District Court's discretion to "resist imposition upon its jurisdiction"[5] by dismissing an action without prejudice on the grounds of *forum non conveniens*. It thus flouts decisions of this Court which recognize the exercise of discretion by the District Court with respect to such matters to be fundamental to "the autonomous administration of the federal courts in the discharge of their own judicial duties."[6]

It need hardly be emphasized here that the broad discretion traditionally afforded the District Courts with respect to various questions of judicial procedure is an essential element of the federal judicial system. The importance of protecting and preserving the right of judges at the trial level effectively to exercise their discretion with respect to those procedural questions which they have been recognized as best qualified to decide has been repeatedly stressed by this Court:

> "Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts. . . .
>
> . . . . .
>
> ". . . . If in a rare instance a district judge abuses the discretionary authority the want of which

[5] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

[6] Koster v. Lumbermens Mutual Co., 330 U.S. 518, 520, n. 1 (1947). See also Sullivan v. Behimer, 363 U.S. 335, 351 (1960).

> precludes an effective, independent judiciary, there is always the opportunity for corrective review by a Court of Appeals and ultimately by this Court." *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U.S. 180, 183-185 (1952).

The issue of *forum non conveniens* is a procedural question which has traditionally and explicitly been left to the sound discretion of the District Court, and the District Court's decision in this regard may not be overturned unless it has clearly abused its discretion. This principle, first expressly adopted in *Rogers* v. *Guaranty Trust Co.*, 288 U.S. 123, 130-131 (1933), was last defined and clarified by this Court in the companion cases of *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947) and *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518 (1947). The Court of Appeals proceeded in total disregard of the teaching of these and similar cases.

In *Gulf Oil*, as in the case at bar, the questions presented were, in the Court's words, "whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens* and, if so, whether that power was abused in this case." 330 U.S. at 502. In upholding the power of the District Court and overruling the Court of Appeals' finding that the District Court had abused its discretion, this Court said:

> "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." *Id.* at 508.

It was made absolutely clear, moreover, that it is the discretion of the District Court, not that of the Court of Appeals, which, unless abused, is to govern the application of the doctrine:

> "We are convinced that the District Court did not exceed its powers or the bounds of its discretion in dismissing plaintiff's complaint and remitting him to the courts of his own community. The Circuit Court of Appeals took too restrictive a view of the doctrine as approved by this Court." *Id.* at 512.

Similarly, in *Koster*, a case strikingly similar to the case at bar, the Court concluded:

> "This Court cannot say that the District Court abused its discretion in giving weight to the undenied sworn statements of fact in defendant's motion papers, especially in view of the failure of plaintiff's answering affidavit to advance any reason of convenience to the plaintiff." 330 U.S. at 531.

The discretion to apply the doctrine of *forum non conveniens* in order to "resist imposition" on their jurisdictions has thus been explicitly vested in the judges of the various District Courts, "the judges who are, to use a familiar but appropriate phrase, on the firing line, who are in much more intimate, continuous touch with the needs for the effective functioning of the federal judicial system at the trial level."[7]

In this case, Judge Robinson, after studying the affidavits filed by the defendants and the legal memoranda submitted by both sides, heard oral argument on the issues presented for over two hours. (JA 27-98).

---

[7] Sullivan v. Behimer, 363 U.S. 335, 355 (1960).

In support of his subsequent decision to dismiss the action without prejudice on the ground of *forum non conveniens,* he filed a sixteen-page opinion (App. B., p. 7a), nine pages of which were devoted exclusively to a careful consideration of the factors recognized by this Court as relevant to the discretionary application of *forum non conveniens*, all of which led, in his judgment, "inevitably to the conclusion that the action must be discontinued here." (App. B., p. 21a).

Yet the Court of Appeals, in a two-to-one decision, has now seen fit to overrule the judgment of the District Court while at the same time refusing to find that it abused its discretion. Indeed, the dissenting opinion of Circuit Judge Danaher found that Judge Robinson not only did not abuse his discretion, but that in fact "he has *correctly* exercised his discretion." (Appendix A., p. 5a, *infra*). (Emphasis added).

The Court of Appeals' blatant substitution of its own view for that of the District Court is emphasized by the cavalier way in which the majority simply ignored the numerous considerations which led the District Court to exercise its discretion in favor of dismissal. The following outline of the various factors held by this Court in *Gulf Oil* and *Koster* to be relevant to the appropriateness of dismissal on the ground of *forum non conveniens* summarizes the consideration given each factor by the District Court.

**1. The Presumption in Favor of the Plaintiff's Choice of Forum**

The District Court recognized the traditional presumption in favor of the plaintiff's choice of forum but relied on this Court's holding in *Koster* that in an action such as a stockholder derivative suit, "where there are hundreds of potential plaintiffs, all equally

entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." 330 U.S. at 524.

**2. The Internal Affairs of a Foreign Corporation**

The District Court found:

(1) that Central "is a Georgia corporation in the fullest sense of the word" (App. B., p. 15a), that its principal place of business is there, its operations are centered there, and almost all of its property is located there, that regular meetings of its stockholders have traditionally been held in Georgia, that its corporate records are kept in Georgia, that the vast majority of its directors and employees are Georgia residents, and that "the extent of its contacts in the District is the solicitation of freight, principally from the government, for movement over its system in Georgia, Alabama and Tennessee" (App. B., pp. 15a-16a);

(2) that "plaintiffs' action, by its very nature, will compel detailed inquiry into various aspects of Central's internal affairs" (App. B., p. 17a);

(3) that, as this Court held in *Koster,* "although the fact that Central's internal affairs must be deeply probed is not alone sufficient to warrant dismissal of the action, it is a circumstance to be given weight in the determination" (App. B., pp. 18a-19a).

**3. The Location of Witnesses**

The District Court found that "the bulk of the witnesses whose testimony must necessarily be heard are outside the District of Columbia" (App. B., p. 17a);

that fifteen of its twenty-one directors reside in Georgia whereas only one is a resident of the District of Columbia (App. B., p. 16a); that 1,494 of its employees reside in Georgia and only eight in the District of Columbia (App. B., p. 16a); that its President and Executive Vice President, "who during the period in question regularly consulted the board of directors on dividend matters," are stationed in Georgia, as are its principal officers concerned with day-to-day operations and maintenance (App. B., p. 16a); that "the plaintiffs have not identified any witness within the District, and aside from the plaintiffs themselves, and the one director and possibly the handful of employees here, no prospect of any other is seen." (App. B., pp. 17a-18a).

**4. The Accessibility of Sources of Proof**

The District Court found that "the records and documents that trial of the issues would inevitably necessitate are concentrated overwhelmingly there [in Georgia]" and that "the plaintiffs have pointed to no documentary evidence within the District that would be needed in or would be relevant to this action." (App. B., p. 18a).

**5. The Location of the Activities Which Occasioned the Suit**

The District Court found that the meetings of Central's Board of Directors at which dividend policy was decided were traditionally held in Georgia and had never been held in the District of Columbia; that Central's operations are centered in Georgia; that almost all of its property is located there, whereas none is found in the District of Columbia; and that "all important events in this litigation occurred outside of the District [of Columbia]." (App. B., pp. 15a, 16a, 18a).

**6. The Application of Law Foreign to the Forum**

The District Court found that this action would be governed by Georgia law and that, while the difficulty of applying foreign law would not of itself justify referring the case to Georgia, this is another factor which, according to this Court's decisions in *Gulf Oil* and *Koster,* should be "carefully considered." (App. B., pp. 18a-19a).

**7. The Public Interest in Avoiding Litigation in a Community Unrelated to It**

The District Court, relying on this Court's ruling in *Gulf Oil,* that "administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin" (330 U.S. at 508), found that the exigencies of its own docket[8] and its responsibilities to the Washington community weighed heavily in favor of dismissal (App. B., p. 20a), that Central performed an important public service, especially to the citizens of Georgia, and since the Complaint involves charges against "those to whom the management and destiny of the corporation have by Georgia law been confided" and to whom as a class "Georgia displays special concern by her requirement that a majority of their group be residents of that state," that "an undertaking, without adequate justification, to resolve the questions the complaint poses in this forum . . . is fraught with all the

---

[8] According to the 1965 Annual Report of the Director of the Administrative Office of the United States Courts, 5,197 civil cases were commenced in the District Court for the District of Columbia in 1965. By contrast, only 1,432 civil cases were filed in all the District Courts in Georgia combined, and any action filed in one of the Superior Courts of Georgia could be promptly tried as soon as the case was at issue. (JA 21).

sensitivities and dangers usually associated with unwarranted intrusions." (App. B., pp. 20a-21a).

**8. The Overriding Tests of Convenience to the Participants and the Interest of Justice**

The District Court, relying upon this Court's holding in *Koster* that "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice" (330 U.S. at 527), found that "the courts in Georgia[9] have far more to offer" (App. B., p. 21a) and that "objective evaluation of all factors related to the interests and conveniences of the parties and witnesses, the litigation itself and orderly administration of the law, leads inevitably to the conclusion that the action must be discontinued here." (App. B., p. 21a).

These determinations fully support the District Court's exercise of its discretion. This Court's review is needed to resist the effort of the Court of Appeals to override without cause the traditional domain of the District Courts. Review is also needed for the narrower purpose of reaffirming the principles announced in *Gulf Oil* and *Koster* with respect to the factors governing the doctrine of *forum non conveniens*. That doctrine is still of vital importance in the District of Columbia, since it is often the only vehicle by which the District Court here can resist imposition upon its jurisdiction.

---

[9] This case could be brought in any of the Superior Courts of the State of Georgia and, if defendant Brosnan were not named, diversity of citizenship would exist, giving respondents the right to sue in the Federal District Courts of Georgia. Mr. Brosnan is committed to appear at either a state or federal court proceeding there. (JA 21).

The District Court for the District of Columbia has a unique dual function, sitting as both a federal court and a local court for the District of Columbia. Its jurisdiction, unlike that of all other District Courts, is not limited by the traditional federal jurisdictional requirements such as diversity of citizenship or the presentation of a "federal question." Thus a high percentage[10] of the cases brought in the District Court for the District of Columbia are cases which, quite apart from considerations of venue and service of process, could not have been brought in any other Federal District Court for lack of federal jurisdiction and therefore, under the holding of *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), may not be transferred to another District Court under 28 U.S.C. 1404(a).[11] Indeed, this is precisely the reason, as the District Court took

---

[10] The Administrative Office of the United States Courts informed counsel for petitioners that of the 5,197 civil cases commenced in 1965 in the District Court for the District of Columbia, 3,922, or 75.5%, were cases of local jurisdiction which therefore could not have been brought in any other Federal District Court. It is evident, moreover, that the unique position of the District Court for the District of Columbia in this regard weighed heavily in the mind of Judge Robinson, who pointed out in the case at bar that:

> "The courts of the District of Columbia are, of course, open to all litigants who have good reason to utilize them. But the exigencies of this Court's docket and its responsibilities to the Washington community necessitate that access be denied where local concern in the litigated matter is at best very remote." (App. B., p. 20a).

[11] 28 U.S.C. 1404(a) provides:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

pains to point out (App. B., pp. 22a-23a), that its decision in the case at bar took the form of dismissal without prejudice under the doctrine of *forum non conveniens* rather than transfer under Section 1404(a). At stake in the case at bar therefore is the continued viability of a doctrine which, because transfer from the District Court for the District of Columbia under Section 1404(a) will often be impossible, is still the only means by which that Court is able to resist imposition upon its already overcrowded calendar of numerous cases in which "local concern in the litigated matter is at best very remote." (App. B., p. 20a).[12]

The initial questions presented by this petition are thus of far-reaching significance to the effective administration of justice in the Federal District Courts, and especially in the District Court for the District of Columbia. The comment of Justice Clark, dissenting on other grounds in *Norwood* v. *Kirkpatrick,* 349 U.S. 29, 42 (1955), in which this Court was called upon to clarify the scope of the trial judge's discretion to transfer an action under Section 1404(a), is equally applicable to the case at bar:

> "The question is one of considerable importance in the administration of the lower federal courts, and, considering the inadequacy of appeal, should be settled in this case if it is to be settled at all in the near future."

In addition to ignoring the principles carefully developed by this Court to assure effective administration of justice at the trial level, the decision of the Court

---

[12] See, *e.g.*, Gross v. Owen, 95 U.S. App. D.C. 222, 221 F.2d 94, 96 (1955); Simons v. Simons, 88 U.S. App. D.C. 180, 187 F.2d 364, 365 (1951), *cert. denied,* 341 U.S. 951 (1951).

of Appeals below places the directors of Central of Georgia Railway Company at a serious and unnecessary disadvantage. They are being forced to defend their business judgment in a forum where they do not live, where none of the events in issue occurred, away from their principal offices where the relevant books and records are maintained, in a jurisdiction which has no general knowledge of Georgia law and remote from the site of the practical operating problems which necessarily govern discretionary dividend action.

The State of Georgia requires that a majority of the directors of a Georgia railroad be Georgia residents, thus assuring that a quorum will always be subject to suit there.[13] Since the directors can therefore always be found and held accountable in Georgia, there is no justification for dragging them into the District of Columbia other than the fact that plaintiffs' lawyer, who is also one of the two plaintiffs, lives in the District of Columbia and apparently prefers to be near his office. The personal convenience of counsel has never been recognized, however, as a relevant factor under the doctrine of *forum non conveniens*. See *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-509 (1947).

The mere presumption in favor of the plaintiffs' choice of forum, moreover, "considerably weakened" in a stockholders' action such as this, is of little

---

[13] Code of Georgia Annotated, Title 94, Railroads § 94-203 (2581) provides:

> "*Meeting for organization; place; notice; quorum. Directors, officers and agents*— . . . No person shall be elected a director unless he be a stockholder owning stock in his own name, and a majority of the directors must be citizens and residents of this State . . . (Acts 1892, p. 40)."

significance when weighed against all the other factors which call for a trial of this action in Georgia. The overriding interest of fair and expeditious judicial administration, not the wishes of the plaintiffs, is the controlling consideration and must be reaffirmed.

### II. Jurisdiction

The second question presented requires the clarification of this Court both because it is jurisdictional in nature and because its treatment by the Court of Appeals below presents a conflict with the decisions of several other Circuits.

The District Court held that it could retain jurisdiction over the plaintiffs' action even though it was conceded that not even a quorum of the directors who were alleged to have abused their discretion could be made parties to the action in the District of Columbia, that at least a quorum was needed to declare dividends, and that a quorum could be sued in an appropriate state or federal court in Georgia.[14] The Court of Appeals did not even pause to discuss the question

---

[14] Apparently recognizing the weakness of their jurisdictional position in the District Court, respondents filed a belated motion to have the Southern Railway Company vouched into the Complaint on the theory that the District Court could then enforce its judgment against the directors of Central by using "leverage" over Southern, the controlling shareholder. (JA 100). Though unwilling to amend the Complaint to state a cause of action against Southern, respondents repeatedly suggested that Southern had somehow acted in an improper manner in influencing Central's directors (JA 62, 67, 68, 81). These unsupported allegations were rejected by the District Court (App. B., p. 11a), the motion was denied, and the District Court's decision in this regard was affirmed by the Court of Appeals.

but nevertheless affirmed without comment the District Court's holding on this issue.[15]

It is of course well settled that the inability of a District Court to obtain jurisdiction over indispensable parties deprives it of its jurisdiction to proceed. *Swan Land & Cattle Co.* v. *Frank*, 148 U.S. 603, 611 (1893); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 235 (1902). The crucial question presented therefore is whether at least a quorum of Central's Directors are indispensable parties in this case.

It should be emphasized once again that this is *not* a case in which a quorum of the defendant corporation's directors is not amenable to suit in *any* forum. As is evident from a review of the Circuit Court decisions discussed below, the weight of authority is clear that a quorum of a company's directors cannot be held indispensable parties to an action when it appears that there is *no forum* in which a quorum of the directors could be sued. That is not the issue here.

It is equally clear, however, that the general rule heretofore recognized—either explicitly or implicitly—by the Courts of Appeals for several Circuits is that in a stockholders' action to compel the declaration of dividends in which, as in the case at bar, the corporation and a quorum of the directors alleged to have

---

[15] Though petitioners did not cross-appeal from the District Court's decision since it emphasized the Court's lack of jurisdiction over a quorum of directors in support of its dismissal under *forum non conveniens*, the jurisdictional issue was vigorously argued in petitioners' brief on appeal and at oral argument. The jurisdictional question was thus properly before the Court of Appeals and should be reviewed here. United States v. American Ry. Exp. Co., 265 U.S. 425, 435-436 (1924); Langnes v. Green, 282 U.S. 531, 538 (1931); Helvering v. Lerner Stores Corp., 314 U.S. 463 (1941).

abused their discretion are subject to suit in at least one jurisdiction, a quorum of the directors are indispensable parties, and the action must be brought in a jurisdiction where they can be sued.

This rule was first recognized by the Sixth Circuit in *Schuckman* v. *Rubenstein,* 164 F.2d 952 (6th Cir. 1947), *cert. denied,* 333 U.S. 875 (1948). Relying on this Court's definition of indispensable parties as "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience,"[16] the Sixth Circuit found that at least a quorum of the directors were indispensable and dismissed for lack of jurisdiction.[17]

> "The court itself cannot declare a dividend; its power is limited to a judgment in personam against the members of the board. . . . Jurisdiction over only two of the nine directors in this case made it impossible for the court to render an effective decree. At least three other directors

[16] Minnesota v. Northern Securities Co., 184 U.S. 199, 236 (1902).

[17] See also Tower Hill Connellsville Coke Co. v. Piedmont Coal Co., 33 F.2d 703, 706 (4th Cir. 1929), where the Fourth Circuit said:

> ". . . It is apparent that, if the court below, by its final decree seeks to direct or in any way to control the management of the Tower Hill of Pennsylvania that company as well as its officers and directors would be necessary and indispensable parties. It follows that any effort on the part of the court below to direct the payment of any specific dividends by the Tower Hill of Pennsylvania would be an effort to control the management of that company, and could not be done without making its officers and directors parties."

were indispensable parties to the suit." (164 F.2d at 957).

The Sixth Circuit's decision in *Schuckman* was distinguished by the Third Circuit in *Kroese* v. *General Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1950), *cert. denied*, 339 U.S. 983 (1950). While holding that directors were not indispensable parties to a lawsuit by a defrauded shareholder to recover dividends on the facts of that case, the Third Circuit made it clear that the predominant consideration which led it to this conclusion was the fact that in *Kroese* there was *no* forum in which a quorum (which in that case was a majority) of the directors could be served.[18] Thus the Court emphasized that "there is no one state or federal district in which a majority of the board may be served" (179 F.2d at 762) and pointed out the inequity of holding a majority of directors indispensable "if that holding results in the complaining shareholder being unable to bring his suit either in any

[18] The *Kroese* decision was closely followed by the Fifth Circuit in Doherty v. Mutual Warehouse Co., 245 F.2d 609 (5th Cir. 1957), a case in which there was also *no* forum in which a quorum of the directors could be made parties. In *Doherty* the stockholder action had been brought in the United States District Court for the Middle District of Alabama against an Alabama corporation which apparently did virtually all of its business in Alabama and which had only three directors. Of these, one had been served with process and appeared. Another had been served but died before entering an appearance. The third was a resident of the District of Columbia and had neither been served nor entered an appearance. Accordingly, at the time the complaint was filed, two-thirds of the defendant corporation's directors were subject to the jurisdiction of the District Court, and, at the time of the Fifth Circuit's decision, one half of its directors were before the District Court. It was thus clear that there was no other forum in which a majority of the corporation's directors could be found and apparently no other forum in which the corporation could be sued.

federal court or, for that matter, in any state court. . ." (*Id.* at 763). In upholding the jurisdiction of the District Court, the Third Circuit concluded that "it would be most unjust if he [the plaintiff] could not prove that claim for the lack of a proper forum." (*Id.* at 766).

In the case at bar, however, respondents were not only free to bring their action in the courts of the State of Georgia; they have been implicitly directed to those courts by the public policy embodied in the requirement under Georgia law that a majority of the directors of all Georgia railroad companies be Georgia residents. Thus the holding of the Court of Appeals below that a quorum of Central's directors were not indispensable parties even though a majority of its directors could have been sued in Georgia is in direct conflict with the Sixth Circuit's holding in *Schuckman* as well as with the rationale of the Third and Fifth Circuits' decisions in *Kroese* and *Doherty*.

In addition, the holding of the Court of Appeals below, if allowed to stand, and the resulting decision on the merits in the District of Columbia would be subject to collateral attack in the courts of Georgia and could confront the directors with the dilemma of reconciling conflicting decisions as to their duty and/or right to declare corporate dividends. Such a result, it is submitted, is not only inconsistent with the holdings of *Schuckman, Kroese* and *Doherty,* but would certainly leave this controversy "in such a condition that its final determination may be wholly inconsistent with equity and good conscience." *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199, 236 (1902).

## CONCLUSION

For the reasons summarized above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GERHARD A. GESELL
701 Union Trust Building
Washington 5, D. C.
*Attorney for Petitioners*

JOHN B. MILLER
HITCH, MILLER, BECKMANN & SIMPSON
400 Georgia State Savings Bank Building
Savannah, Georgia

BINGHAM B. LEVERICH
COVINGTON & BURLING
701 Union Trust Building
Washington 5, D. C.
*Of Counsel*